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Registering as a 'Foreign Agent'? Why Law Firms and Lobby Shops Might Demur.

Skadden Arps got dinged by the feds for unreported advocacy in 2012 for the Ukrainian government. Practitioners tell us generally some of the considerations that weigh on firms and lobby shops when they are engaging with foreign clients.

By C. Ryan Barber | January 23, 2019

In April 2012, as he finalized a deal to work for Ukraine, Greg Craig passed along terms specifically requested by the leadership of his firm **Skadden, Arps, Slate, Meagher & Flom (https://www.law.com/law-firm-profile/?id=279&name=Skadden)**.

Skadden offices in Washington, D.C. (Photo: ALM)

Craig, then a Skadden partner who had served as President Barack Obama's first White House counsel, said in an email that the "powers that be" in the firm's New York office "insist—and I agree—that we should include a provision in the retainer agreement that [Skadden] is not being retained to engage—and will not engage—in political activities as defined by the Foreign Agents Registration Act."

The engagement **letter (https://drive.google.com/file/d/1DfZ2ZwSSRwAVrDzd0Ao3Q6rd4UrTYZUa/view)** outlining the scope of Skadden's activities included a nearly identical provision.

But the work would nonetheless veer into political territory, the U.S. Justice Department said last week. In a **settlement (https://at.law.com/bAvjoG?cmp=share_twitter)** resolving claims that Skadden skirted its legal obligation to register as an agent of Ukraine, the Justice Department detailed the firm's preparation of a report on the prosecution of the country's former prime minister, Yulia Tymoshenko. Skadden agreed to pay more than $4.6 million, representing the income it received from Ukraine.

The Justice Department said Craig had misled the government and his own firm about his role in Ukraine's a public relations strategy, alleging that the former partner falsely stated that he only provided copies of the Tymoshenko report in response to requests from the media and only spoke to reporters to correct "misinformation" about the report.

Craig, meanwhile, reportedly **faces (https://www.washingtonpost.com/politics/former-white-house-counsel-gregory-craig-under-scrutiny-by-prosecutors-in-offshoot-of-mueller-probe/2018/09/23/68de1acc-bdac-11e8-8792-78719177250f_story.html?utm_term=.b61b85e4a4b2)** an investigation by federal prosecutors over his unregistered advocacy for Ukraine. A lawyer for Craig, William Taylor of Washington's Zuckerman Spaeder, **has said (https://www.law.com/nationallawjournal/2018/09/15/greg-craig-repped-by-bill-taylor-zuckerman-spaeder-amid-sdny-investigation/)** Craig was not required to register under the foreign-agent law. On Wednesday, Taylor said he and Craig "absolutely stand by" that statement.

What the Justice Department did not explicitly state—at least publicly—was any understanding of Skadden's motivation. Was there a reason the firm did not register its work under the Foreign Agents Registration Act?

The firm did not respond to a request for comment about any motivation not to file. In a statement Sunday, Skadden said: “We have learned much from this incident, and we look forward to putting these events behind us.”

Here are several reasons, according to practitioners in Washington, why law firms and lobby shops generally might decide not to register their work for a foreign entity.

Avoiding any perceived stigma.

In Washington, where leaders in the influence industry might aspire to hold public office, some see the job of registered “agent” for a foreign interest as a less than ideal addition to the resume. Such work, while legal, might raise questions.

“I think there’s traditionally been one primary reason where you hear people talking about not wanting to register, and it’s generally connected to issues of reputational risk,” said **Wiley Rein (https://www.law.com/law-firm-profile/?id=325&name=Wiley-Rein-LLP)** international trade partner Dan Pickard, commenting generally about FARA and not the specifics of Skadden’s settlement.

Pickard added: “The burden of reporting under FARA—while it’s not minimal, it’s $305 every six months, and then it’s reporting of monies received, monies expended and activities undertaken—the reporting itself is not overly burdensome.”

Still, many lobbyists and public affairs officials are happy to take advantage of an exception to FARA—as the law is widely known—that applies to foreign companies whose U.S. advocacy is not directed by or conducted on behalf of a foreign government. The exception allows lobbyists for such foreign companies to disclose their work under the Lobbying Disclosure Act a law that requires substantially less detail about lobbying activities.

It was thanks to that exception that former Sen. Joe Lieberman of Connecticut, now senior counsel at **Kasowitz Benson Torres (https://www.law.com/law-firm-profile/?id=2868&name=Kasowitz-Benson-Torres-LLP)**, was able to disclose his work for the Chinese telecom giant ZTE Corp. under the less rigorous LDA. In a **disclosure filing (https://soprweb.senate.gov/index.cfm?event=getFilingDetails&filingID=6D40FB20-288F-4352-A6C4-**

907BB5CC04A6&filingTypeID=1) with the U.S. Senate, Lieberman appeared to question whether the submission was even necessary, saying he was "not advocating for ZTE" but rather conducting an independent assessment of the national security concerns surrounding the Chinese company's products.

Lieberman said he was nonetheless registering to lobbying "in the interest of transparency and caution."

Spotlighting Lieberman's statement that he was not "advocating," the Campaign Legal Center has **argued (https://assets.documentcloud.org/documents/5691256/CLCLieberman.pdf)** Lieberman cannot make use of the FARA exception and file under the Lobbying Registration Act if he is not, in fact, lobbying. The public interest group has asked the Justice Department to investigate whether Lieberman is violating FARA in connection with his work for ZTE.

Or maybe it's a client's preference, for competitive reasons.

For foreign governments and certain overseas companies, disclosures under FARA can open a window for competitors to view the details of lobbying work in the United States.

The registration law requires lobbyists and other advocates to provide the Justice Department with copies of materials distributed to government officials and copies of agreements between firms and clients—documents that are not similarly required of companies and lobbyists that file disclosures under the Lobbying Disclosure Act.

Robert Kelner walks into court with his client Michael Flynn in Washington DC. (Photo: Diego M. Radzinschi / ALM)

"Whether it's a law firm or a lobbying firm or a consulting firm that's hired by the foreign government client, the challenge that some firms face is frequently the desire of the client that the U.S. firm not register under FARA. In addition to that, some people feel that, by registering as a foreign agent, they limit their professional opportunities going forward," said **Covington & Burling (https://www.law.com/law-firm-profile/?id=69&name=Covington)** partner Robert Kelner, who was speaking generally about compliance matters and not about Skadden's case.

Kelner added: "Sometimes there's a concern that, by having to disclose all the details of your work, that will be harmful to the client. Some firms are reluctant to be in the position of damaging a client by reporting all details in a way that critics and competitors can know all the details of what they're up to."

Firms can't advocate on a contingency-fee basis.

Big law firms are not the only outfits registering to advocate for foreign clients. The mix includes lobbying and public relations firms.

A little-known but problematic provision of FARA is its prohibition on U.S. firms agreeing to contingency fees based on a success—perhaps a passed bill or a dropped sanction—for a foreign client. The provision is rooted in an amendment to FARA in 1966—nearly three decades after the law was passed to shed light on Nazi propaganda efforts—that shifted the law's focus from political propagandists to agents furthering the economic interests of foreign clients.

"Law firms, lobbying firms and PR firms that intend to include a contingent fee as part of their compensation deal with the client have an incentive not to register under FARA because, if they do register, they would have to abandon the contingent fee," Kelner said.

That provision is particularly problematic for lobbying firms, many of which rely "very heavily" on contingency fees, Kelner said.

"For them, FARA registration directly undercuts their business model," he said.

Read more:

The Curious Case of Joe Lieberman's Work as a Lobbyist Who Isn't 'Advocating' (https://at.law.com/dUyW1D?cmp=share_twitter)

Skadden Registers Ukraine Advocacy After Settling DOJ's Lobbying Case (https://at.law.com/bAvjoG?cmp=share_twitter)

FARA Settlement Spotlights Greg Craig's Ukraine Work (https://at.law.com/Vgir8y?cmp=share_twitter)

Mueller's Interest in Skadden Presents Unique Crisis Management Challenge (https://at.law.com/yPb5qb?cmp=share_twitter)

Washington's FARA Frenzy Spurs New Legal Business (https://at.law.com/XGuyHd?cmp=share_twitter)

Amid Mueller Probe, Gregory Craig Retires From Skadden (https://www.law.com/nationallawjournal/2018/04/24/amid-mueller-probe-gregory-craig-retires-from-skadden/)
